In the Supreme Court of Indiana, November Term, 1856.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY *vs.* WHITENECK.

1. The right of trial by jury may be waived, and such waiver will be valid.
2. The fundamental principles of civil government discussed, and authorities cited.
3. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of *correct* legislation, but may because it violates the fundamental principles of the Constitution.
4. A law may be constitutional in part, and unconstitutional in part, hence, a law which enacts that railroads shall fence, as to that provision is a reasonable regulation, but where it inflicts a penalty upon an appeal, it is unconstitutional and void.

The opinion of the court was delivered by

PERKINS, J.—Suit commenced before a Justice of the Peace to recover the value of a heifer killed by a locomotive on the Madison and Indianapolis Railroad. Recovery before the justice, and appeal to the Common Pleas. In that court, the defendant not appearing, judgment was rendered for plaintiff without the intervention of a jury, for double the amount of the judgment before the justice, &c.

A point is made which may be briefly disposed of before entering upon the main questions in the cause.

It is said, a jury should have been called to assess the damages, notwithstanding the failure of the defendant to appear, as the case stood upon the general issue.

The constitution of our State does not say that trials shall be by jury. It says the "right of trial by jury shall remain," &c. If a party voluntarily abstains from claiming the right in a given case, we think it may be judicially held that it is waived. Hence, the statute enacting that such act shall be regarded as a waiver is valid. 2 R. S. 115.

The suit was instituted under the act of March 1st, 1853, Laws of 1853, p. 113, relative to compensation for animals killed or injured by railroad machinery; and as the act is short and gives

rise to several somewhat weighty questions now to be considered, we insert it, except the repealing section, in this opinion. It follows:

"An Act to provide compensation to the owners of animals killed or injured by the cars, locomotives or other carriages of any railroad company in this State. Approved March 1, 1853.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any animal or animals shall be killed or injured by the cars or locomotives or other carriages used on any railroad in this State, the owner thereof may go before some justice of the peace of the county in which such injury occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county.

SECT. 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident.

SECT. 3. If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per cent., the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket fee of five dollars.

SECT. 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company."

It is contended that this act is unconstitutional—

1. Because the object of it is not indicated in its title. It is claimed to be, in fact, an act to compel railroads to fence in their tracks, and to inflict penalties on the exercise of the right of appeal.

2. Because it is a special act. And,

3. Because it violates private right.

It is further insisted that its third section is unconstitutional, because it impairs the right of appeal.

1. We do not think the whole act void for inconsistency with its title. Its immediate purpose is there expressed. The act contains an exception as to railroads that are fenced; but we think the exception so properly connected with the subject matter of the act designated in the title, as rightly to appear in it under that title.

2. We do not think the act void simply because it is special. There is no provision of the constitution prohibiting, in terms, special legislation on the subject of railroads; and, from the peculiar character of the subject, we cannot say such legislation may not be proper. Special subjects may require some special legislation; and when it takes place, it will be for the court to judge, as in the Clay county case and the Lafayette murder cases, under section 23 of article 4, of the constitution, whether more general legislation could reasonably have been made applicable; 5 Ind., 4 and 7 Ind. 326; and also whether such special legislation conflicts with any other constitutional provision.

3. The act is alleged to infringe private right and principles of natural justice, because it makes requirements of railroad companies beyond those contained in the laws under which they are organized, and unwarrantably interferes with the prosecution of business pursuits; and it is insisted that the legislature cannot thus act for want of authority.

This objection brings up to some extent, the general question of the power of the legislature over the various pursuits of the people of the State, in other words, of legislative power; and we propose to avail ourself of the occasion to express somewhat at length our views upon it. What, then, is the legislative power of this State? The answer to this question must be drawn from an examination of the constitution. Turning to it we find article 3 to provide that the powers of government shall be divided between three departments, and section 1, of article 4, to declare that, "The legislative authority of the State shall be vested in the General Assembly."

But so far, these sections, it will be observed, do not define that legislative authority; they simply ordain a division of powers and designate the department in which the legislative, whatever it may be, shall be lodged. The distribution of the powers of government,

as a distinctive feature in their creation, among different departments, is a comparatively modern idea, suggested by the accidental development, in that form, to a great extent, of the British government, and probably first, formally enunciated to the world as an invaluable precept in the science of politics, by the celebrated Montesquieu, of Bordeaux, in France, in his Spirit of Laws, published about the middle of the 18th century. Such division, therefore, does not necessarily follow upon the simple organization of a government. Hence it became imperative, in order to insure a distribution of powers in the government of this State, to provide for it in the organization. Madison, in No. 47 of the Federalist.

The legislative power, then, being as yet simply located, the inquiry still occurs, what, how great, is that power? Is it unlimited? This question has been much discussed of late, in several cases, and deserves most careful consideration in its final determination. It has been asserted by some that "the legitimacy of all laws originates, not in the will of him or them who make the laws, whoever they may be, but in the uniformity of the laws themselves to truth, reason, and justice,—which constitute the true law."—Guizot on Rep. Government, pp. 204, 217. And if we add the further proposition of some religious, moral, and political philosophers, that it is the right of every man to judge of this conformity to justice of each law, and to obey or disobey it accordingly, we have complete, what is called in this day, the "higher law" doctrine; a doctrine consistent with the individual independence of man, but utterly inconsistent with, and impracticable in, orderly government.

In such a government the legitimacy of laws must rest in the will of the law-making power. It must be so, or government is nothing. Still, there are subjects and matters in relation to which no government should assume to control the will or action of any individual. This we shall make appear in the course of this opinion. Hence, the law-making power should be limited. Yet, from its very nature, it would seem that, practically, limits could scarcely be set to its exercise except by written constitutions; nor by these, without the existence of a power to annul laws enacted outside of the limits established; and, historically considered, we do not find that it had

been thus limited prior to the formation of the American States. True, Great Britain had, before that time, her Magna Charta and Petition of Right, but they were not ordained by the people in their sovereign capacity, and were not, in fact, paramount to acts of Parliament, however much deference might, under ordinary circumstances, be paid to them. Parliament remained, in reality, omnipotent. No power tested its enactments by a constitution.

Nor would the legislative power necessarily be limited by a written constitution. That might simply provide for a government, without any restriction upon its power, or it might expressly confer unlimited power. In either of these cases its power would, doubtless, be absolute; if not morally, at least practically.

But a constitution might limit the legislative power. It might do this either by specifying the cases in which alone the power should be exerted, or it might confer the power generally, subject to certain limitations, in which even the power would remain indefinite, unlimited wherever limitations did not operate. This latter is the case of the constitution of Indiana. Our legislature is not by abstract moral right, but in actual fact, absolute, where not restrained by that instrument. *Doe* vs. *Douglass*, 8 Blackford, 10.

The legislative power in this State, where the constitution imposes no limits, must be practically absolute whether it operate according to natural justice, or not, in any particular case, for when a law is created by the legislature, the executive must enforce it, and is vested with control of the military power of the State to enable him to do it; and, aside from the physical power of the united people of the State, there is no power to arrest the execution except the judiciary, and that department can only do it when the law conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. *Herman* vs. *The State*, 4 Am. L. Reg. 344. *Beebee* vs. *The State*, 5 Ind. 501.

The great point of difficulty here, therefore, must ever arise in determining the meaning, the extent of operation of the declaratory and expressly restrictive provisions of the organic law—the reservations in the bill of rights—in short, the implications of the consti-

tion. Such it was in the case of Beebee, supra. May the judiciary pronounce a law void because of repugnance to the fundamental principles of the government declared in the constitution as being prohibited by implication, though not in express words? Or because of repugnance to the clear scope and intention, the spirit of express restrictions as being impliedly embraced by them? These are now the questions. For example, the first section of the article of the "Bill of Rights," declares that all men are endowed with unalienable rights, among which are life, liberty, &c. Now, how broad a meaning is to be given to this section? With what view or object was it inserted in the constitution? What should be its interpretation? We shall enter upon no discussion of man's power of alienation, and no criticism of the word "unalienable." See Lieber vol. 1, p. 218. We shall not insist upon the philological accuracy of its use. We shall not dispute but that primordial or imprescriptible or unalienated might have been better used. We shall only endeavor to ascertain the meaning with which the term "unalienable" was used. And if, to express that certain rights had not been alienated, and ought not to be, a term was used which meant that they could not be, it does not weaken the force or clearness of intention in the expression.

We proceed, then, to the work of interpretation. In *Prigg* vs. *Pennsylvania*, 16 Pet. on page 610, it is said that "perhaps the safest rule of interpretation (of the constitution) after all will be found to be, to look to the nature and object of the particular powers, duties and rights, with all the light and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as will fairly secure and obtain the end proposed." To the same effect, *Martin* vs. *Hunter*, 3 Cond. Rep. on p. 557; 1 Kent, 448; Federalist, No. 78; Smith on Statutes, p. 418, Sec. 276. Guided by this rule, let us proceed to seek the true interpretation of the first section of the Bill of Rights above quoted. We examine it in the light of contemporary history.

The monarchies of Europe were formerly, if they are not now, administrated upon the principle that the people were utterly destitute of all rights, and entirely at the mercy of government. In the

17th century the principle was not only thus acted upon, but it was maintained in formal treatises as being in accordance with the will of God. The tyranny exercised upon the people, under this doctrine, roused attention, excited inquiry as to, and led to the denial of, its soundness. Men, with minds liberalized, enlightened, and invigorated by the perusal of recovered ancient learning, and hearts warmed by the eloquence of ancient freedom, entered upon the study of the science of the rights of man, and arrived at the conclusion that he was possessed of such by nature which it was tyranny in government to invade. Such statesmen and scholars as Buchanan, Harrington, Milton, Sidney, Fletcher, Vane, and others, perhaps their equals, among whom it is not improper to include the illustrious and excellent William Penn, ably answered the writings of Filmer and other advocates of despotic power. The controversy waxed warm and spread widely. It enlisted the nation. It came with the colonists to America, and was prolonged. Great Britain practiced upon her maxims of absolutism in governing here, disregarding the rights of person and property. The people denied the justice of her administration, and made a question upon their natural rights. Histories of the Revolution, *passim*. The discussion of the question extended to France, and there, as it had done in England and in America, produced a revolution. The French convention, pursuant to suggestion of Lafayette, 3 Mod. Europe, 186, Mack's Life of Lafayette, 219, declared:

"The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistence of oppression." 2 Paine's Pol. Works, 112. And, per Lafayette, in that convention: "Every man is born with rights inalienable and imprescriptible; such are the liberty of his opinions, the care of his honor and his life, the right of property, the uncontrollable disposal of his person, his industry and all his faculties; the communication of all his thoughts by all possible means; the pursuit of happinesss and the resistance of oppression."

"The exercise of natural rights has no limits, but such as will insure their enjoyment to other members of society." Mack,

supra. And see the same in Cutter's, and in Headley's Life of Lafayette. This declaration, Burke, who, alarmed at innovation, had abandoned liberal principles, undertook, in his "Reflections," &c., to refute; and, as to the British nation, contended that if its people ever had any rights, they had formally alienated them, made "as solemn a renunciation of them as could be made," by a declaration to King William, on his accession to the throne, that: "The Lords spiritual and temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit *themselves, their heirs and posterities forever,*" &c. 1 Burke's Works, Dearb. Lib. Ed., on p. 463.

These reflections of Burke drew forth replies—among them, Paine's Rights of Man, and Sir James Mackintosh's powerful "Defence of the French Revolution," in which he vindicates the declaration of man's natural rights, and proves the unsoundness of Burke's doctrine. "This doctrine," says he, "thus false in its principles, absurd in its conclusions, and contradicted by the avowed sense of mankind, is, lastly, even abandoned by Mr. Burke himself. He is betrayed into a confession directly repugnant to his general principle, viz: Whatever each man can do without trespassing on others, he has a right to do for himself," &c.

Again: "The existence and perfection of these rights being proved, the first duty of law-givers and magistrates is to assert and protect them. The moment that the slightest infraction of these rights is permitted through motives of convenience, the bulwark of all up-right politics is lost. If a small convenience will justify a little infraction, a greater will expiate a bolder violation; the Rubicon is past." Mackintosh's Miscel. Works, pp. 590, 591, 592. Pending this great discussion the people of the United States came to a decision upon the question in controversy and thus declared it. "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men," &c. Dec. of Independence. This declaration was framed and adopted by men of no mean judgment and who under-

stood and weighed the language used. The States severally, most of them, proceeded to ordain constitutions of government in which they said; for example, as in that of Pennsylvania:

"That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:

"That all men are born equally free and independent, and have certain independent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing happiness." And they declared that everything in the Bill of Rights was excepted out of the general powers of government, and to forever remain inviolate.

In the constitution of Delaware, thus:

"Through divine goodness, all men have by nature the right of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them," &c. *Accord*, Kentucky, Ohio, Indiana, in 1816, and other States. Connecticut in 1818, till which time she had lived under her colonial charter, and Rhode Island, who had thus lived till 1843, when she also formed a constitution. Placing ourselves thus amid the circumstances in which the framers of our early State constitutions stood at their formation, and from thence interpreting them, and ours as a substantial copy, what force should be conceded to the first article of the Bill of Rights which we have quoted? The purpose for which it was intended appears to be plain enough, and also the great importance attached to it. The monarchies of Europe maintained the doctrine that the people had no natural rights, and hence, might rightfully be controlled at will and without limit by the government. The people in this country denied the doctrine and determined to emancipate themselves from it.

The governments of Europe practiced upon their principles and disregarded all rights in the people in administration. They regu-

lated everything by law, even, on occasions, "the subsistence of the people." The hand of authority was seen in everything, and in every place." They were actuated by "a restless desire of governing too much." Burke, supra, vol. 2, p. 192; and see Stevens' Lectures on France, p. 17.

These abuses, oppressions, the people of this country determined to prohibit here; they determined to be, in the language of some of the constitutions, secure from their exercise upon themselves or their posterity. That security they designed should be perpetuated by their constitutions, and particularly by the clause in question.

In the great discussion of which we have spoken above, a proposition had been submitted, for the first time in the history of the world, thinks Mr. Sparks, by Sir Henry Vane, that "restraint be laid upon the Supreme power as a FUNDAMENTAL CONSTITUTION," that it might be "bound up" so that "this great blessing (of freedom of conscience) will hereby be so well provided for, that we shall have no causeto fear." Sparks' Am. Biography, vol. 4, pp. 262, 263.

Such was the object and intention of the framers of our constitution, in regard to natural rights. They designed the first section of it as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a State government to exert legislative power, specify them and exclude all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them. They did specially prohibit such as they had experienced. But naming such attempts did not exclude the prohibition of others by the general fundamental provision. *The State* vs. *Barbee*, 3 Ind. 258; *Thomas* vs. *The Board, &c.*, 5 Ind. 4. Further, we may say that these restraints were intended to operate upon the legislative power, though we suppose that this will not be denied. Parliament had most severely outraged the rights of America. The colonists "knew it to be their most dangerous enemy." 6 Bancroft, 138. It had enacted laws prohibiting certain pursuits in America. 1 Botta's Hist. 25, 26.

The judges of England, in answer to a question by Cromwell, Earl of Essex, had reluctantly said, that if parliament should condemn a man to die without a hearing, it would be valid. Hallam's Const. Hist. p. 28. Mr. Jefferson urges as an objection to the Constitution of the United States, the want of a Bill of Rights. In a letter to Col. Humphreys, in 1789, he says:

"I am one of those who think it a defect, that the important rights not placed in security by the power of the constitution itself were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which the governments have yet always been found to invade. These are the rights of thinking and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom."

"We are now allowed to say, such a declaration of rights, as a supplement to the constitution where that is silent, is wanting, to secure us in these points. The general voice has legitimated this objection." Jefferson's Works, vol. 3, p. 13. The States, in their several constitutions, obviated, as to them, the objection. Such a declaration, Mr. Jefferson admitted, would place a check in the hands of the judiciary. 1 Tuck. Life of Jefferson, 281.

Having thus ascertained the intention of the section in question, it is the duty of the court, so far as is consistent with its language, to give effect to it accordingly. The mere demarcation on parchment of the constitutional limits is not a sufficient guard against the encroachments of tyrannical legislation. The early history of Virginia establishes this; and of Pennsylvania. In this latter State, in 1783, and 1784, a council of censors assembled, charged with the duty of inquiring "whether the constitution had been preserved inviolate;" and they reported that it "had been flagrantly violated by the legislature in a variety of important instances." Madison, in Federalist, No. 48. "Liberties are nothing until they have become rights—positive rights, formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not entrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces inde-

pendent of them, in the limit of their rights. Convert liberties into rights, surround rights by guarantees, entrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress towards a free government." Guizot on Rep. Gov. 302.

"The courts of justice are to be considered the bulwarks of a limited constitution." Federalist No. 68. "The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. Ibid and 2 Lieber, pp. 280, 281, 282.

We come to the conclusion, then, that the courts should declare void a law in violation of this fundamental principle of the constitution, a law in violation of the natural rights of man. To be explicit. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of correct legislation; but because it violates a fundamental principle of the constitution. 2 Lieber, 602; 6 Ind. 87, 88, 96; 1 Kent, 450, note; *Martin ex parte*, 8 Eng. Ark. 198. The act annulled according to the expression always used touching the subject, must be *unconstitutional.*

It has been said, indeed, by high authority that "there are certain absolute rights and the right of property among them, which, in all free governments, must of necessity be protected from legislative interference, irrespective of constitutional checks and guards." 7 Blackf. 477. And the dictum is supported by eminent jurists and writers of celebrity. American Law Magazine, vol. 1, p. 319 (1843) and the cases there cited. Junius, vol. 1, p. 88, in dedication.

But this doctrine would not be admitted in the English courts where there is no written constitution, and cannot arise here, because, as we have seen, our constitution does protect these natural rights.

Again, it is sometimes said the courts may pronounce an act void because not properly within the scope of legislative power; but this is also by virtue of the constitution; for that instrument ex-

pressly declares that the powers of government shall be divided between three departments, the legislative being one, and it expressly inhibits either from acting out of its assigned sphere; art. 3; hence, the constitution, in fact, prohibits the passage of any act by the legislature not properly within the scope of legislation.

We here take leave of this topic, remarking that as our system of polity was framed by politicians—using the word as a synonym of statesmen, not of politicasters—we have necessarily been led, in construing it, to study and cite the opinions of that class during the period of its formation. The review has considerably extended this opinion; and the propriety of the course is justified in the language of a section of the first constitution of Ohio, art. 8, sec. 18, "That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty."

And per Mackintosh supra, "Perhaps the only expedient that can be devised by human wisdom to keep alive public vigilance against the usurpation of partial interests, is that of perpetually presenting the general right and the general interest to the public eye."

If it be said that the principles asserted will sometimes thwart the will of a majority, we answer, it is admitted; but what then? Ours is not, as were, to some extent, the ancient republics, a government directly of masses and majorities, but is

1. A government by representatives.
2. With limited powers.
3. With those powers divided among departments.
4. With one department having the ultimate right to decide upon the respective powers of all, and to annul action beyond the limits of those powers. It is, in short a government within a constitution. The majority, here, cannot do everything, much less, a plurality which elects our legislature. The majority rules when all act within the limits of the constitution. If a majority or plurality may do what it pleases, and this is to be the rule without limitation, the constitution should be at once abrogated, and leave us a legislature as omnipotent as the British parliament. Till this is done we must uphold the restraints of the constitution, wisely imposed by

the people themselves, upon the action of majorities and the usurpations of the legislature. Minorities, here, have some rights as against majorities, and all have some security from legislative tyranny. In the restraints of the constitution lie the liberties of the people. If it be said we thus deprive the legislature, to some extent, of power to do good, we admit it; but we also deprive it of power to do evil. Unlimited power in mortal hands is always abused. We only attempt to confine that of the legislature within the limits the people, by their fundamental law, assigned to it—limits fixed after probabilities of good and of evil had been weighed and balanced; and if those limits are unsatisfactory, the fault is of the constitution not of us. It should ever be remembered that ours is a government that seeks to reconcile public order with private right and individual liberty. And if it is found that this cannot be done to perfection, it is to be considered in reference to the ordaining of a new constitution, whether any, and if so, how much of individual excess is to be tolerated as a lesser evil than the subjection of the people to despotic power. See Lieber on Liberty and Self-Government, passim. "Tyranny and mere tranquility," says Lieber in his Political Ethics, vol. 2, pp. 4, 6, "are things for which men may be trained, into which they may be forced. There are no more quiet and peaceable people on earth than the Chinese." They have a saying: "Better a dog in peace than a man in anarchy." "Rather however," says Lieber, "all the disturbance of the West, so that it be a fermentation which promises a better, purer State, than Chinese peace and stagnation." See on this point *Herman* vs. *The State*, 4 Am. L. Reg. 344.

The natural rights of which we have spoken, let it be observed, are not rights of vagrancy; but they inhere in man as a necessity of his nature; they belong to him because he is a man, and because he would not exist as such without their exercise. Life was the gift of his Creator, but life is not in man, self-sustaining; it must be prolonged by nourishment and protection of the body. Hence, man must have food and clothing. The demand of nature is absolute. God has given the earth and the abundance thereof whereby to supply this necessity; and limbs, and intellect, ingenuity, by the

use of which, food and raiment, property, may be obtained, upon and out of this earth and in no other manner — these are the gifts and necessities of nature, and belong to man as man. God has also made man a moral being accountable directly to Him in respect to their mutual relations. Hence, no human authority can step between this accountability and man's Maker, and final Judge; and, hence, man's natural, necessary right; duty, even, to worship his Maker in such a manner as he will be willing to be accountable for. The race of man is perpetuated by a communion of the sexes, and parental care of offspring. The sexes are about equal in number. Every man, therefore, has the natural right to one wife and no more— monogamy is the law of nature. We thus discover that the idea of unlimited sovereignty in one man or any number of men over another is unjust, unreasonable, violative of his moral nature, unwarrantable tyranny. In this manner are man's natural rights ascertained, defined, limited, rendered as certain as any other facts. As to some of them most publicists are now agreed. Others are to be determined. As enumerated by Lieber, in his work on Political Ethics, these rights are substantially: 1, Life; 2, Personal Liberty; 3, Free Agency; 4, Resistance to oppression; 5, Trial by law before Condemnation; 6, Right of Utterance, Communion, Speaking and Writing; 7, Reputation; 8, Security of Person, Family, &c.; 9, Freedom of Conscience, Worship, &c.; 10, Property, including Commerce. Traffic, he insists, "is a necessary right, exercised, according to history, from the origin of society, growing indispensably out of the necessary division of labor." Exchange is one of the most lawful, necessary and natural means of acquisition, founded in the variety of soil, clime, genius of people, agents of nature, &c. and one of the first and most effective means of civilization. Exchange lies in the great order of things;" (see also, 1st vol. Tucker's Life of Jefferson, pp. 58, 59,) and would alone warrant another primordial right, viz; 11, That of locomotion, going where one desires. Vol. 1, p. 192, et seq. of Lieber.

But notwithstanding the legislature cannot prohibit, it may regulate the exercise of natural rights, and all pursuits and practices of its citizens. We do not propose to elaborate this branch of the

subject at length, but lay down the following propositions as expressing the result of our reflections upon it.

1. No man has a right to pursue a business or practice *malum in se*, entirely evil in itself. Example: The manufacture and sale of counterfeiting apparatus and counterfeit money. These articles are not and cannot be supplied to the public to meet any want, or for any useful purpose. They are made with the sole intent of cheating and defrauding. So the practices of gaming, drawing lotteries, &c., are no reasonable modes of exchange on equivalent considerations, but tricks to cheat the unwary.

2. The legislature may prohibit such pursuits and practices.

3. Every man has a right to pursue any and every business or practice not evil in itself, which the wants, appetites, fashions, and follies even, of community invite to. Lieber, vol. 1, pp. 159, 160. And,

4. The legislature cannot absolutely prohibit such pursuits. This must be admitted or it must be admitted that all pursuits are at the sufferance of the legislature—the doctrine in England, where there is no constitution, and of a late case in Delaware, *The State* vs. *Allmond*, which ignores the bill of rights and constitution of that State, following as it does, to the fullest extent, Blackstone's idea of liberty under the British government. A. L. Register, vol. 4, p. 533. But,

5. No man in the prosecution of his lawful business or practice has a right intentionally or carelessly to annoy or injure another. And, hence,

6. The legislature has a right to establish reasonable regulations in relation to such business or practice calculated to prevent the occurrence of such injury. The exercise of this right is analagous to requiring security for good behavior, keeping the peace.

These regulations may relate:

1. To time. Examples: Preventing railroad trains, coming from any infected point, entering any other inhabited place—preventing the running of trains on Sunday, &c.—suspending the exercise of any and every right during temporary emergencies in war and rebellion, as in the case of the writ of habeas corpus.

2. To place. Examples: Auction sales under the windows of a church in time of service. Sales of liquor near the grounds of a camp meeting — offensive trades, such as slaughtering establishments, &c., in cities, &c., and storing, and building of, combustible materials where they would endanger the security of life and property of others, without fault on their part.

We say without fault on their part, for it is a well settled principle of common and maritime law that a person cannot complain of an injury that his own fault inflicts. And with a poor grace would it be asked that the running of locomotives and cars should be entirely prohibited because some persons might be foolish enough to place themselves upon the road track and be run over; or that the use of ropes should be prohibited because hypochondriacs and those disappointed in business or love, might occasionally hang themselves by them.

3. To manner, occasion, &c. Rapid driving through the streets of a crowded city—sales or gifts knowingly made of dangerous articles, to lunatics, drunken men, idiots, minors, &c., being persons incompetent to properly use them, and likely to use them to others' injury.

Says Lieber, Pol. Eth. vol. 1, p. 200:

"It is not said that utterance, though necessary for me in my character of man, may not be regulated or suspended. Though I have as man the indisputable right of utterance, I have not the right to use it everywhere and on all occasions. So does my right of locomotion not entitle me to go where I choose, into my neighbor's field, closet, &c. I am not allowed to speak loud in church, in a deliberative assembly."

Usury laws are another instance of regulation. "But all these are exceptions, as by way of exception, the police may examine my rooms, whether I ventilate them properly in times of a general infection." Lieber. Generally, in these cases, it is for the judiciary, in the last resort, to judge of the consistency of regulations made by the State or cities with the constitutional rights of the citizens. Trades and practices must be tolerated so far as they are properly used; they may be restrained at the point where they

begin to be abused. Public policy encourages trade, and incites to inventions, leading to new pursuits, by rewarding the successful. Contracts in general restraint of trade are void at common law, as are contracts in full restraint of marriage, though partial and reasonable restraints in relation to both subjects are valid. *Beard et al.* vs. *Denis*, 6 Ind. 200. A contract not to marry a particular person is good, but a contract not to marry at all is void. Chit. Cont. 671. "Marriage, no doubt may be made the subject of regulation by qualified restrictions, under certain circumstances, but under no circumstances whatever ought a general and entire restriction of it to be countenanced and sanctioned by law." *Middleton* vs. *Rice*, 6 Pa. L. Journ. 240. Quoted on p. 399, (top paging,) of Williams on Personal Property.

By-laws of cities in restraint of trade, are, when unreasonable, void. Ang. and Am. on Corp. p. 277. In the light of these considerations and established principles, we think the legislature had a right to prescribe the condition or regulation, as enacted, that railroads shall fence, or pay for the stock they injure. We cannot say judicially that is not a reasonable regulation, necessary to prevent their injuring others, without such others' fault.

4. The third section, so far as it inflicts a penalty, for appealing and failing to reduce the judgment 20 per cent. is, in our opinion, unconstitutional and void.

A law may be constitutional in part and unconstitutional in part. This third section relates to the practice of the law in these cases. The trial and rendition of judgment are a part of the practice in a cause. The section is special. Laws are general or special. This is the first great division. Special laws are again divided into local, personal, particular, &c. See Smith's Com. p. 419. A special act concerns "the particular interest or benefit of certain individuals, or of particular classes of men." See 1 Kent, 459. A law may be "partly public and partly private."

The principle of this act is entirely different from the principle of those general laws fixing the jurisdiction of the several courts. The jurisdiction of the court of the justice of the peace is limited by them in respect to amount. But within that limit it operates alike

upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

The section then under consideration being special, and upon the practice of the law, is prohibited by that clause of section 22, art. 4, of the constitution, which provides that no such act shall be passed, "regulating the practice in courts of justice."

5. The first section of the act is also void, so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. In that particular it is special, and in conflict with that clause of the section of the constitution just cited which prohibits special laws; "regulating the jurisdiction and duties of justices of the peace and of constables."

This point, however, does not affect the present case. The judgment is reversed, with costs, and the cause remanded for trial and judgment according to the course of the general law of the State.

In the Supreme Court of Chittenden (Vt.) County, 1855.

DAVIES & AUBIN *vs.* JOHN BRADLEY & CO.

Where a shipper consigns goods to a factor and endorses and sends forward bills of lading for them, and upon the faith of such bills of lading the factor makes advances. *Held*, that the facts constituted such a symbolical delivery of the goods to the factor or consignee as to amount to a constructive possession, and that the factor's lien attached.

The opinion of the court was delivered by

REDFIELD, Ch. J.—The question in the present case is in regard to the right of a factor to a lien upon goods consigned to him and upon which he has made advances. Ashurst, J. in giving the opinion of the court in *Lickbarrow* vs. *Mason*, 1 H. B. 357; 2 T.